RECORD AND BRIEFS

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In the

Supreme Court of the United States

VIRGINIA URANIUM, INC. et al.,
Petitioners,

v.

JOHN WARREN, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every economic sector, and from every region of the country. More than 96% of the Chamber's members are small businesses with 100 or fewer employees.

An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community. The Chamber has participated as *amicus curiae* in nearly every significant federal preemption case decided by this Court over the past decade. *See, e.g.*, *Kindred Nursing Ctrs. L.P. v. Clark*, 581 U.S. ___ (2017); *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190 (2017); *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938 (2016); *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016); *Nw., Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014); *Nat'l Meat Ass'n v. Harris*,

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received notice of the intent to file this brief at least 10 days before it was due, and have consented to this filing.

565 U.S. 452, 455 (2012); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011); *Wyeth v. Levine*, 555 U.S. 555 (2009); *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

The Chamber and its members have a strong interest in this case, as the decision below poses a threat both to the Nation's nuclear energy industry and to preemption doctrine as a whole. Accordingly, the Chamber files this brief in support of the petition for certiorari.

INTRODUCTION

More than 30 years ago, this Court concluded that the federal government has "occupied the entire field of nuclear safety concerns," and that the Atomic Energy Act accordingly preempts any state law "grounded in safety concerns" arising from the production of nuclear energy. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n* ("*PG&E*"), 461 U.S. 190, 212-13 (1983). In the years since, this Court has reaffirmed that state laws "motivated by safety concerns" stemming from nuclear-related activities fall squarely within the Atomic Energy Act's prohibited field. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 84 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249 (1984). Consistent with that precedent, for years, courts of appeals unanimously concluded that state legislation has no force or effect when its "purpose" is to guard against the same radiation hazards that Congress has given the federal government the exclusive power

to regulate. *See, e.g.*, *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393 (2d Cir. 2013); *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004).

Nonetheless, the Fourth Circuit below held that Virginia may ban mining of the Nation's single largest uranium deposit—not for economic or other non-preempted reasons, but simply because Virginia purportedly determined that uranium production is not safe enough, despite pervasive federal regulation. Indeed, the state does not dispute that it banned uranium *mining* at the Coles Hill deposit as a safety measure to prevent radiation exposure allegedly associated with uranium *milling and tailings management*—the federally-regulated extraction and handling of uranium from mined ore that precedes the production of nuclear power. *See* 42 U.S.C. §2021(k) (providing that states retain the power to regulate nuclear energy-related activities only "for purposes *other than protection against radiation hazards*" (emphasis added)). But that is not a judgment for Virginia to make, as any state statute "grounded in [radiological] safety concerns falls squarely within the prohibited field" occupied by the federal government and is preempted. *PG&E*, 461 U.S. at 213. The decision below thus cannot be reconciled with the Act, with this Court's precedents, or with decisions from other courts.

But the problems with the Fourth Circuit's decision do not end there. According to the Fourth Circuit, the reason Virginia's mining ban is not preempted even though it rests on precisely the kind of safety judgment forbidden to the states is because

the ban does not say *on its face* that the state has prohibited uranium *mining* to prevent purportedly unsafe *milling and tailings management* from occurring at Coles Hill. In other words, according to the Fourth Circuit, a state may escape the preemptive force of federal law through the simple expedient of declining to make explicit in its laws its preempted motivations. The decision below thus creates a loophole not just for the Atomic Energy Act, but for all manner of federal statutes and regulations, as it effectively invites states to use labels and form to try to circumvent federal law.

That result cannot be reconciled with the long line of decisions from this Court reiterating that the "Supremacy Clause cannot be evaded by formalism." *Haywood v. Drown*, 556 U.S. 729, 742 (2009). The Fourth Circuit abdicated its judicial responsibility under the Supremacy Clause by declining, *as a matter of law*, to "look past the statute's plain meaning to decipher whether the legislature was motivated to pass the ban by" concerns that Congress has reserved to the federal government alone. Pet.App.14a. Simply put, when a state admittedly regulates for the specific purpose of countermanding federal judgments in an exclusive federal field, its actions are preempted no matter what label or form the state may use. By concluding otherwise, the decision below threatens to disrupt not just the Atomic Energy Act and the critical industry of nuclear power generation—an industry that is responsible for nearly 20% of the Nation's electricity supply—but preemption doctrine as a whole. Accordingly, this Court should grant certiorari to resolve the circuit split that the decision below

creates and restore the full preemptive force of the Atomic Energy Act.

REASONS TO GRANT THE PETITION

I. Nuclear Power Is A Core Component Of The Nation's Energy Supply.

When Congress enacted the Atomic Energy Act, it "determin[ed] that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing." *PG&E*, 461 U.S. at 207. Since then, nuclear power has become an important component of our country's energy supply. Today, nuclear reactors fueled by uranium are responsible for nearly 20% of the electricity produced in this country. Pet.App.202a. And nuclear energy continues to offer many benefits that confirm its indispensable value to a diversified energy economy; for example, nuclear power "accounts for nearly two-thirds of the country's emissions-free power generation," and nuclear reactors "operate at about a 90% capacity factor, higher than any other fuel type." *See Expand Nuclear Energy Use and Commit to a Nuclear Waste Solution*, U.S. Chamber of Commerce Inst. for 21st Century Energy, http://bit.ly/1nyGP0I (last visited May 24, 2017).

In no small part because of those benefits, the United States "has the greatest number of nuclear reactors in the world at present, and therefore the

greatest demand for nuclear fuel." CA4 JA236.[2] But domestic demand for uranium is not being satisfied by domestic supply. Quite the opposite. In 2015, for example, owners and operators of civilian nuclear power reactors in the United States purchased 57 million pounds of uranium concentrate. Pet.App.351a. Fully ***94%*** of that uranium was imported from foreign countries, and approximately 40% came from Russia, Uzbekistan, and Kazakhstan alone. *Id.* at 352a. By comparison, net imports of petroleum in 2015 accounted for just 24% of domestic petroleum consumption in the United States. *See Oil: Crude and Petroleum Products Explained*, U.S. Energy Information Admin., http://bit.ly/2qcZOQM (last updated May 8, 2017).

As these figures illustrate, domestic uranium production is low. In fact, it is "near historic lows" since the atomic era began in the 1940s. *U.S. Uranium Production Is Near Historic Low As Imports Continue To Fuel U.S. Reactors*, U.S. Energy Info. Admin.: Today in Energy (June 1, 2016), http://bit.ly/2mDoHGC. In 1980, the United States produced nearly 45 million pounds of uranium concentrate. *Id.* In 2016, the United States produced fewer than 3 million pounds of uranium concentrate—less than 7% of 1980 production and the lowest output in more than a decade. *See* U.S. Energy Info. Admin. *Domestic Uranium Production Report—Quarterly* (Feb. 10, 2017), http://bit.ly/2pDNM1A. In fact, the United States has not produced more than 5 million pounds of

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[2] Citations to "CA4 JA" refer to the Joint Appendix filed in the Fourth Circuit.

uranium concentrate in any of the past 20 years. *Id.* at 2.

As a result of the nearly historical low domestic production of uranium, the continued viability of nuclear energy in the United States—responsible for one-fifth of the Nation's electricity supply—is presently almost entirely dependent on imports from foreign countries, with a large percentage coming from countries in the former Soviet Union. As many U.S. government officials have lamented, that poses a threat both to the Nation's economic well-being and to its national security. *See, e.g.*, Pet.App.381a (Statement of Sen. Portman) ("[t]here's no question" that "being reliant on foreign countries including Russia for uranium" is "a national security issue"); *id.* at 383a (Statement of Sen. Barraso) (noting that uranium development provides "good paying jobs for American[s]" and suggesting that dependence on foreign uranium presents a national security risk); *id.* at 384a (Statement of now-Nuclear Regulatory Commission Chairman Macfarlane) ("Certainly, it's important for the United States to have a diverse supply of energy as possible and to have as much domestic supply as possible as well."); *id.* at 388a (Statement of Sen. Cassidy) (noting that dependence on foreign uranium is "of incredible importance to our national security and to our energy security"). In short, domestic uranium production and supply is an issue of surpassing importance to the economy and security of our Nation.

II. The Decision Below Has Far-Reaching Consequences For The Future Of Nuclear Power In The United States.

The decision below has considerable implications for the nuclear power industry and the Atomic Energy Act. At the outset, this case alone will have a significant impact on the nuclear energy industry, as it concerns the single "largest natural deposit of uranium in the United States and one of the largest in the world." Pet.App.201a. The Coles Hill deposit contains an estimated 119 million pounds of uranium ore. *Id.* It is thus no exaggeration to say that allowing Virginia's ban on mining the deposit to stand will have a massive impact on the entirety of the Nation's nuclear power industry. And the impact is even more profound for Virginia and its residents, as estimates suggest that mining the Coles Hill deposit could "generate $4.8 billion of net revenue for Virginia businesses." *Id.* at 202a.

But the decision below also has far broader implications, as it guts the Atomic Energy Act of a key aspect of its preemptive force. As this Court has made clear, "the pre-empted field" under the Act is defined, "in part, by ... the *motivation* behind the state law"—specifically, whether it is animated by concerns about radiological safety. *English*, 496 U.S. at 84 (emphasis added); *see also PG&E*, 461 U.S. at 213 (finding it "necessary to determine whether there is a non-safety rationale" for state's nuclear power plants moratorium). That is clear on the face of the statute. Not only does the Act give the federal government the power to regulate nuclear power plants and the antecedent activities of uranium

"milling" (*i.e.*, the extraction of uranium from ore) and "tailings management" (*i.e.*, the safe handling of radioactive waste products generated by uranium milling).[3] *See, e.g.*, 42 U.S.C. §§2111(a), 2014(e)(2), 2133; 10 C.F.R. pt. 40, app. A. The Act also expressly provides that states retain the power to regulate nuclear energy-related activities only "for purposes *other than protection against radiation hazards.*" 42 U.S.C. §2021(k) (emphasis added).

To be sure, as this Court recognized in *PG&E*, that means that states may still regulate aspects of the nuclear industry for reasons *other than* safety concerns, such as economic concerns. But "a state judgment that nuclear power is not safe enough to be further developed would conflict directly with the countervailing judgment" of Congress. *PG&E*, 461 U.S. at 213. Simply put, "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." *Id.* at 212. Accordingly, any state statute "grounded in [radiological] safety concerns falls squarely within the prohibited field" occupied by the federal government and is preempted. *Id.* at 213; *accord* Brief for the United States as *Amicus Curiae* at 11, *Nielson v. Private Sector Fuel Storage, LLC* (No. 04-575) (Nov. 2005) ("[T]he AEA preempts *any*

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[3] As Judge Traxler explained in dissent below, "[t]he Act did not seek to regulate conventional uranium mining on nonfederal lands ... because Congress did not perceive that mining itself posed serious radiological risks." Pet.App.25a n.5 (citing S. Rep. No. 79-1211, at 18-19 (1946); Atomic Energy: Hearings Before the Committee on Military Affairs on H.R. 4280, 79th Cong. 125 (1945)). As soon as radiological risks are presented, however, federal regulation begins.

state legislation that falls within 'the field of nuclear safety concerns.'" (quoting *PG&E*, 461 U.S. at 212-13)).

That should have made this an easy case. Virginia does not contest (and cannot contest, at this motion to dismiss stage) that it banned uranium mining at Coles Hill out of safety concerns about potential radiological hazards. The ban thus "conflict[s] directly with the countervailing judgment" of Congress. *PG&E*, 461 U.S. at 213. Yet the Fourth Circuit inexplicably concluded that petitioners' preemption claim failed *as a matter of law*, because the court "decline[d] the invitation" to "look past the statute's plain meaning to decipher whether the legislature was motivated to pass the ban by" concerns that Congress has reserved to the federal government alone. Pet.App.14a. Thus, in the Fourth Circuit's view, a state may legislate with the admitted purpose of preventing the very activities that Congress enacted the Atomic Energy Act to encourage, so long as it does not say on the face of its statute that it is doing so.

That holding is impossible to reconcile with this Court's decisions in *PG&E* and *English*, both of which confirm that the Atomic Energy Act demands the very motivation-based inquiry that the Fourth Circuit "declined" to undertake. *See, e.g.*, *PG&E*, 461 U.S. at 213; *English*, 496 U.S. at 84. It also squarely conflicts with decisions from other circuits following this Court's command that state legislation has no force or effect when its "purpose" is to guard against the same radiation hazards that Congress has given the federal government the exclusive power to

regulate. *See, e.g.*, *Entergy Nuclear*, 733 F.3d at 415-23; *Skull Valley*, 376 F.3d at 1247-48. Left standing, the decision below thus not only will preclude mining at the Nation's single largest uranium deposit based on judgments that Congress has decided are not for Virginia to make, but will serve as an invitation to other states to try to countermand the critically important interests that the Atomic Energy Act serves.

III. The Decision Below Provides A Roadmap For State And Local Governments To Evade The Preemptive Force Of Federal Law.

The square conflict between the decision below and decisions from this Court and other circuits is reason enough to grant certiorari. But the decision below threatens consequences far beyond the Atomic Energy Act, as it provides a roadmap to other states seeking to evade the preemptive force of all manner of federal statutes.

As this Court has admonished time and again, it is the substance of a state law, not its form, that controls the preemption inquiry. *See, e.g.*, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 214-15 (2004); *Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 382-83 (1990); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985). States thus cannot evade the Supremacy Clause through the simple expedient of labeling their laws something other than what they are. To be sure, in many preemption cases, the substantive inquiry turns on the *effect* of a state law, not its purpose. But when Congress chooses, as it did in the Atomic Energy Act, to define "the pre-empted field, in part, by ... the motivation behind the state

law," *English*, 496 U.S. at 84, then courts must look beyond labels and form to determine the purpose behind the challenged law. Otherwise, states could avoid preemption merely by declining to make their true motivations explicit—as Virginia has now succeeded in doing here.

Of course, a purpose-based preemption inquiry will not always be an easy one. But it certainly is not a difficult question in this case. Not only has the state never denied that it banned mining at Coles Hill for precisely the reasons that Congress has reserved to the federal government; it also does not dispute that the "legislature banned uranium mining *only as a means to prevent milling and tailings management from occurring* in Virginia," Pet.App.26a-27a (emphasis added)—two activities that even the majority acknowledged may be regulated only by the federal government, *see id.* at 12a-13a. Yet the court nonetheless refused to hold the state's ban preempted, simply because the "the plain language of the ... ban *does not mention* uranium milling or tailings storage." *Id.* at 14a (emphasis added). In other words, under the Fourth Circuit's view, a state is free to countermand federal regulation to its heart's content, so long as it is smart enough not to "mention" preempted fields on the face of its law.

That reasoning poses a threat not just to the Atomic Energy Act, but to all manner of federal statutes. The Supremacy Clause would be rather meaningless if states could sidestep preemption through the simple expedient of including or omitting magic words in their legislation. Yet that is precisely

the result that the decision below countenances. So long as a state "does not mention" on the face of its law its intent to target an area reserved by Congress to the federal government, the Supremacy Clause can be evaded. Indeed, the Fourth Circuit allowed Virginia's ban to escape preemption even though the state *admits* that it rests on a judgment that nuclear fuel is not safe enough due to purported radiological safety concerns—a judgment that "conflict[s] directly with the countervailing judgment" of Congress to prohibit states from substituting their own judgments about radiological safety for those of the federal government. *PG&E*, 461 U.S. at 213.

Left standing, that decision not only will invite other states to impede Congress' efforts to encourage domestic uranium mining, but will invite states and local governments to engage in more of the same clever labeling and workarounds that this Court repeatedly has held cannot suffice to evade the Supremacy Clause. *See, e.g.*, *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 463-64 (2012) (state could not avoid federal meat inspection laws by prohibiting sale of meat that did not satisfy state's own conditions); *Haywood*, 556 U.S. at 742 (state could not immunize its correction officers from section 1983 money damages suits by divesting state courts of jurisdiction over such suits); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (state could not avoid federal regulation of vehicle manufacturing by requiring purchasers to purchase only vehicles that complied with state's manufacturing preferences). Accordingly, the Court should grant certiorari to resolve the circuit split that

the decision below creates and restore the full preemptive force of the Atomic Energy Act.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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